(14)

Supreme Court of the United States

OCTOBER TERM, 1944

No. 798

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

CHESTER BOWLES, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

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December 29, 1944.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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PETITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Safeway Stores, Incorporated, respectfully submits to this Honorable Court the following:

A

STATEMENT OF MATTER INVOLVED

This case is based upon protests filed by petitioner against five price regulations and one general order issued by the Price Administrator whereunder various allowances were

provided for the performance of pre-retail functions, except when such functions were performed by petitioner and others similarly situated, and whereunder various percentage mark-ups were provided for the determination of retail ceiling prices, which mark-ups, in many instances, varied, to petitioner's detriment, between the latter's retail stores and those of its competitors in the same sales-volume category, all in purported pursuance of Section 2 of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. Appx. § 901.

The facts are established by the allegations of the complaints (R. 516-526, 532-542) as admitted by the answers (R. 528-531, 544-547).

Petitioner, a Maryland corporation with its principal offices in Oakland, California, owns and operates more than 2,300 retail food stores in 23 States of the United States and in the District of Columbia as a single corporate entity. It has an historic business practice of maintaining the same prices on the same commodities in all of its stores in the same trading area, irrespective of the total sales volume of each store. The majority of the stores had a total sales volume for the year 1942 of less than $250,000 per store.

Petitioner sells numerous commodities, including meats, fresh fruits and vegetables, dry groceries (canned and packaged foods), and soaps and cleansers. It makes most of its purchases direct, for which purpose it maintains buying offices and receiving warehouses, also both produce and dry-grocery warehouses such as are maintained by intermediate sellers, retailer-owned cooperatives, and independent wholesalers. It performs all functions required from the purchase of the commodity through its delivery to the retail store: inspecting, sorting, trimming, caring for and storing, packaging, etc., as the case may be, and then

assembling orders, loading the trucks, and making deliveries. These functions are often called wholesale functions, although they are more accurately termed pre-retail functions, or warehousing and pre-warehousing functions. Suffice it to say, petitioner performs them, and expenses are incurred in their performance.

Petitioner is in active competition with all retail grocery and meat distributors in its various trading areas, including groups of so-called retailer-owned cooperatives which maintain and operate warehouses that perform wholesale functions of essentially the same type as those performed by petitioner.

The regulations in question are Maximum Price Regulation 390 (8 F. R. 6428), MPR 422 (8 F. R. 9395), revised MPR 271 (8 F. R. 7017), MPR 421 (8 F. R. 9388), MPR 426 (8 F. R. 9546), and General Order 51, Amendment 2 (8 F. R. 8690).

Maximum dollars and cents prices for all household soaps and cleansers sold at retail food stores were established by MPR 390. For the purpose of fixing prices retail food stores were classified into four different groups. Groups 1, 2 and 3 were classified upon the basis of the type of ownership and the volume of sales. Group 4 was classified solely upon the basis of volume of sales. Thus Group 1 is comprised of independent stores with a sales volume of less than \$50,000; Group 2 of independent stores with a sales volume of \$50,000 or more but less than \$250,000; and Group 3 of chain stores (that is, stores included in a group of four or more under common ownership whose combined 1942 sales totalled \$500,000 or more) which individually have a sales volume of less than \$250,000. Group 4 is comprised of all stores with a sales volume of \$250,000 or more, whether independent or part of a chain store organization. The Ad-

ministrator adhered to this classification in other regulations here involved.[1]

In MPR 422 the Administrator established percentage markups to be used by Group 3 and Group 4 stores, within which groups petitioner's stores fall, in determining the ceiling prices to be charged by them for certain dry groceries and perishables listed in the regulation. In MPR 423 he established percentage mark-ups to be used by Group 1 and Group 2 stores. Generally, the mark-up for Group 4 is lower than for Group 3, and in most instances the mark-up for Group 3 is lower than for Groups 2 and 1.

The variations in these mark-ups are graphically illustrated by a table (R. 525-6) showing the percentage ratios permitted for each group of stores. The mark-ups permitted Group 1 stores, which are the highest where there is any difference, are shown as 100%, whereas the mark-ups for the other groups are expressed in percentages as compared to the 100% in Group 1. For example, in the case of canned meat (Item 19, R. 526) Groups 1 and 2 are allowed the same maximum mark-up under MPR 423, expressed as 100%, whereas, under MPR 422, Group 3 stores are allowed only 71.4% as much, and Group 4 stores 66.7%. In the case of gelatin and pudding mixtures (Item 14, R. 526) the maximum mark-up is allowed a Group 1 store, while a Group 2 store is permitted only 89.3% as much, a Group 3 store 75%, and a Group 4 store only 46.4%.

Under the other regulations here involved allowances are afforded to various persons, other than petitioner and those similarly situated, for performing essential pre-retail functions. Petitioner is precluded from taking the mark-ups provided because they are restricted to persons who do

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[1] It is significant, however, that the Administrator departed from what he is pleased to call his "standard classification" of stores when he drafted MPR 355, and still further when he drafted various amendments thereto. See petitioner's petition in Docket No. 799 in this Court.

not "sell" at retail. Prior to the argument in the lower court certain allowances had been provided (MPR 422, § 18) for packaging services performed in the warehouse. Then, after the argument of the case and before the decision was rendered by the Emergency Court, the Administrator admitted the inequity of his attitude and recognized the performance of certain *pre-warehouse* functions by persons in petitioner's category. He did this, *more than 15 months*[2] *after the issuance of the protested regulations*, by allowing a mark-up (provided by Amendment 32, 9 F. R. 12590, to MPR 422) of 1½% above first cost, after the adjustment of certain specified charges and additions, for the performance of such functions. The Economic Stabilization Director approved the action as being "necessary to correct a gross inequity." This relief is partial not only because it does not include those pre-retail functions and services which are performed *after* the commodities are received in petitioner's warehouses and until they are actually delivered to

[2] Dilatory tactics have been characteristic of the Administrator, at least in his dealings with petitioner. Three of the price regulations and the one general order involved herein were issued and protested as follows: (1) RMPR 271 issued May 23, 1943, and protested July 3rd (R. 86-91); (2) GO 51, Amendment 2, issued June 22, 1943, and protested July 15th (R. 103-108); (3) MPR 421 issued July 8, 1943, and protested July 21st (R. 119-127); and (4) MPR 426 issued July 10, 1943, and protested September 2d (R. 137-141). The dates upon which the Administrator was required to take action upon these protests pursuant to Section 203(a) of the Price Control Act were, respectively, August 23rd, September 20th, October 6th, and October 8th, 1943. After the expiration, on August 23rd, at the time when the Administrator was required to act upon the protest to RMPR 271 petitioner filed a complaint in the Emergency Court on the theory that the Administrator's failure and refusal to act were equivalent to a denial of the protest. This contention was finally decided adversely to petitioner, the court holding that an overt act of denial was required by the Act. *Safeway Stores* v. *Brown*, 138 F. (2d) 278. Subsequently, in the light thereof, on May 23, 1944, petitioner found it necessary to request that the Emergency Court issue a mandatory order requiring the Administrator to take final action on the aforementioned protests. On June 1, 1944, he denied them.

petitioner's retail stores, but also because they do not apply even to those pre-warehouse functions which are performed for commodities (not processed or manufactured by petitioner) other than fresh fruits and vegetables. The relief is also partial where it actually applies because it does not grant to petitioner allowances comparable to those permitted other persons who performed substantially the same functions.

Protests were duly filed to the five price regulations and one general order here involved. Two of the protest proceedings were consolidated and then denied by the Administrator. The other four protest proceedings were likewise consolidated and denied. Each group of protests became the subject of a separate complaint filed in the Emergency Court pursuant to Section 204(a) of the Emergency Price Control Act, 50 U. S. C. Appx. § 924(a), 56 Stat. 31, and they were there consolidated. That Court entered a judgment of dismissal on November 29, 1944.

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. Appx. § 924(d), 56 Stat. 31. The complaints herein were dismissed by the Emergency Court on November 29, 1944. (R. 605.)

C

QUESTIONS PRESENTED

The primary questions presented are:

(1) Whether the Administrator may classify stores on the basis of sales volume and type of ownership (chain or independent) without regard for the services rendered or the functions performed.

(2) Whether the Administrator, by adopting widely varying price differentials, may discriminate between petitioner's stores in Groups 3 and 4 and also between those stores and independent stores (Groups 1 and 2) which do less than $250,000 gross business annually, as do the majority of petitioner's stores.

(3) Whether the Administrator may provide mark-up allowances for pre-retail functions and services performed by persons other than petitioner without providing similar mark-up allowances for such functions and services when they are performed by petitioner.

D

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court of Appeals has decided a substantial question of Federal law of general importance which has not been, but should be, settled by this Court.* Section 2 of the Emergency Price Control Act provides for the establishment of maximum prices which will be "generally fair and equitable". The decision of the Emergency Court herein is to the effect that discriminatory mark-ups and allowances may at the same time be "fair and equitable". The Court refuses to recognize any discrimination in the determination of mark-ups and allowances even though similar discrimination were characterized by the Stabilization Director as a "gross inequity"; it considers its only duty to be to determine whether the ultimate retail prices have been shown not to be generally fair and equitable. In support of its conclusion that they are proper the Court points to the fact that petitioner operates at a profit. Thus, mere operation at a profit is made the sole criterion of a fair and equitable price structure. Discrimination is condoned if it does not result in an actual operat-

ing loss to the person who is adversely affected. Such an interpretation of the Act circumvents the intent thereof to prevent inflation without resort to arbitrary tactics, such tactics being grounds for declaring a regulation invalid under the review provisions of the Act. If such an interpretation were warranted, the Act would be invalid as unconstitutionally discriminatory.

2. *The Emergency Court has interpreted the Price Control Act in such a way as to defeat the due process of law guaranteed by the Fifth Amendment to the Constitution and provided by Congress.* Section 204 of the Act contains provisions for the review of actions of the Administrator denying protests against price regulations. The Emergency Court is empowered to set aside any regulation which is found to be "arbitrary or capricious". However, by interpreting the Act to *authorize* arbitrary methods unless they are shown to be unfair and inequitable to a *major* portion of the industry, the court has rendered ineffective the review provisions and made a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

WHEREFORE, the petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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December 29, 1944.